RECORD
AND
BRIEFS

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No. 16-309

In the Supreme Court of the United States

DIVNA MASLENJAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction under 18 U.S.C. 1425(a) for knowingly procuring naturalization contrary to law, based on misrepresentations in the defendant's application for naturalization, requires proof that the misrepresentations were material.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 14
Kungys v. *United States*, 485 U.S. 759 (1988) 14
Neder v. *United States*, 527 U.S. 1 (1999) 9, 18, 19
Skilling v. *United States*, 561 U.S. 358 (2010) 11
United States v. *Abuagla*, 336 F.3d 277 (4th Cir. 2003) 12
United States v. *Aladekoba*, 61 Fed. Appx. 27 (4th Cir. 2003) 17
United States v. *Alameh*, 341 F.3d 167 (2d Cir. 2003) 12
United States v. *Alferahin*, 433 F.3d 1148 (9th Cir. 2006) 16
United States v. *Damrah*, 412 F.3d 618 (6th Cir. 2005) 12
United States v. *Latchin*, 554 F.3d 709 (7th Cir. 2009), cert. denied, 558 U.S. 1116 (2010) 17
United States v. *Mensah*, 737 F.3d 789 (1st Cir. 2013), cert. denied, 134 S. Ct. 1912 (2014) 17
United States v. *Munyenyezi*, 781 F.3d 532 (1st Cir.), cert. denied, 136 S. Ct. 214 (2015) 12, 16, 17
United States v. *Puerta*, 982 F.2d 1297 (9th Cir. 1992) 7, 16
United States v. *Shabani*, 513 U.S. 10 (1994) 9
United States v. *Wells*, 519 U.S. 482 (1997) 8, 9, 10

Case—Continued: Page

United States v. *Youssef*, 547 F.3d 1090 (9th Cir. 2008) 11, 12

Statutes:

8 U.S.C. 1101(f)(6) 5, 6, 11
8 U.S.C. 1427(a)(3) 5, 6, 10, 11
8 U.S.C. 1451(a) 7, 13, 14, 15, 16
8 U.S.C. 1451(e) 2, 5, 7, 14, 15
18 U.S.C. 201(b)(1) 13
18 U.S.C. 1001 12
18 U.S.C. 1001(a) 17
18 U.S.C. 1014 ..... 8, 9
18 U.S.C. 1015 10
18 U.S.C. 1015(a) 4, 5, 6, 11
18 U.S.C. 1341 9
18 U.S.C. 1423 ..... 2, 4
18 U.S.C. 1425 ..... 13, 14, 15
18 U.S.C. 1425(a) ..... *passim*
18 U.S.C. 1546(a) 12
21 U.S.C. 846 9

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-39a) is reported at 821 F.3d 675.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2016. A petition for rehearing was denied on May 27, 2016 (Pet. App. 40a). On August 3, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 26, 2016. The petition for a writ of certiorari was filed on September 8, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of knowingly procuring naturalization contrary to law, in violation of 18 U.S.C. 1425(a), and one count of knowingly using an unlawful-

ly issued certificate of naturalization, in violation of 18 U.S.C. 1423. Pet. App. 2a. The district court sentenced petitioner to two years of probation and revoked her naturalization under 8 U.S.C. 1451(e). Pet. App. 6a. The court of appeals affirmed. *Id.* at 38a.

1. Petitioner is an ethnic Serb and a native of what is today the nation of Bosnia, formerly part of Yugoslavia. Pet. App. 3a. Petitioner was born in a predominantly Serbian village, but Muslims made up the majority of the population in the surrounding region, resulting in clashes with ethnic Serbs like petitioner and her family. *Ibid.* In 1992, petitioner briefly moved with her family from her home village to the Serbian city of Belgrade but returned to Bosnia soon after. *Ibid.* As the breakup of Yugoslavia accelerated in the 1990s, and conditions in Bosnia deteriorated, the United States sent immigration officials to Belgrade to assist refugees fleeing Bosnia and the ethnic cleansing taking place there. *Ibid.*

In April 1998, petitioner and her family met with an American immigration official in Belgrade to seek refugee status based on their fear of persecution in their home region of Bosnia. Pet. App. 3a. Petitioner was the primary applicant on her family's asylum application. *Id.* at 3a-4a. She stated under oath that her family feared persecution because her husband, Ratko Maslenjak, did not serve in the Bosnian Serb army during the civil war. *Id.* at 4a. Petitioner swore that when she returned to Bosnia with her children in 1992, her husband had remained in Serbia to avoid conscription into the Bosnian Serb army. *Ibid.* Petitioner claimed that, as a result, she and her husband had lived apart from 1992 to 1997. *Ibid.* Based on those representations, petitioner and her family, in-

cluding her husband, were granted refugee status and immigrated to the United States in 2000, where they settled in Ohio. *Ibid.* In 2004, petitioner obtained lawful permanent resident status. *Ibid.*

Several years later, immigration officials discovered that petitioner's story was false. See Pet. App. 4a. Military records revealed that Ratko Maslenjak had been an officer in the Bratunac Brigade of the Army of the Republic Srpska, also known as the Bosnian Serb Army or VRS, and that he had served during a timeframe that included the unit's participation in the 1995 genocide of 8000 Bosnian Muslims, known as the Srebrenica massacre. *Ibid.* Petitioner was present when, in December 2006, immigration officials questioned Ratko at the family's Ohio home about his failure to disclose his military service. *Ibid.* Soon after, Ratko was charged with two counts of making a false statement on a government document and was arrested. *Id.* at 4a-5a.

One week after Ratko's arrest, petitioner filed an N-400 Application for Naturalization. Pet. App. 5a; see *id.* at 65a-74a (copy of application). One of the questions on the application asked whether she had ever "given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion or removal." *Id.* at 72a (question 23). Another question asked whether petitioner had ever "lied to any U.S. government official to gain entry or admission into the United States." *Ibid.* (question 24). Petitioner falsely answered "no" to both questions. *Ibid.* Petitioner was also interviewed under oath about her written answers, but she declined to make any changes when given the opportunity. *Id.* at 5a. In August 2007,

petitioner was naturalized as a United States citizen. *Ibid.*

In October 2007, Ratko was convicted on both counts of making false statements on a government document, rendering him subject to removal from the United States. Pet. App. 5a. In an effort to avoid removal, Ratko filed a petition for asylum, and petitioner testified on her husband's behalf at his asylum hearing. *Ibid.* During her testimony, petitioner admitted that she and her husband had in fact lived together in Bosnia after 1992 and that she had lied during her 1998 refugee application interview in Belgrade. *Id.* at 5a-6a.

2. Petitioner was charged on one count of "knowingly procur[ing], contrary to law, her naturalization," in violation of 18 U.S.C. 1425(a). Indictment 1-2; see Pet. App. 6a. The indictment alleged that petitioner had "made material false statements" by answering "no" to questions 23 and 24 on her Form N-400 Application for Naturalization, and by "answering the same" during her naturalization interview, even though she "then well knew that she had lied to government officials when applying for her refugee status and her lawful permanent resident status and thereby gained admission into the United States." Indictment 1-2. Petitioner was also charged with knowingly misusing evidence of naturalization, in violation of 18 U.S.C. 1423, in connection with her attempt to obtain lawful permanent resident status for her husband. Pet. App. 6a.

a. At the conclusion of the evidence at trial, the district court instructed the jury on the elements of Section 1425(a), as well as the elements of two underlying federal laws related to naturalization, 18 U.S.C.

1015(a) and 8 U.S.C. 1427(a)(3). Pet. App. 84a-86a. With regard to Section 1425(a), the court stated that "[i]n order to prove that the defendant acted 'contrary to law' the government must prove that defendant acted in violation of at least one law governing naturalization." *Id.* at 85a. With regard to Section 1015(a), the court told the jury that a naturalization applicant is guilty of that offense if he or she "knowingly mak[es] any false statement under oath, relating to naturalization." *Ibid.* The court further instructed that a "false statement contained in an immigration or naturalization document does not have to be material in order for the defendant to have violated the law in this case." *Id.* at 86a. Petitioner objected to those instructions insofar as they did not require the jury to find that petitioner had made a material false statement under Sections 1425(a) and 1015(a). *Id.* at 75a-82a. The court overruled the objection. *Id.* at 82a.

Next, the district court instructed the jury on 8 U.S.C. 1427(a)(3), which "requires an applicant to demonstrate that 'she has been and still is a person of good moral character.'" Pet. App. 86a. The court instructed the jury that "[g]iving false testimony for the purpose of obtaining any immigration benefit precludes someone from being regarded as having good moral character." *Ibid.*; see 8 U.S.C. 1101(f)(6). The court added that "[i]f an applicant does not possess good moral character, the applicant is not entitled to naturalization." Pet. App. 86a.

b. The jury convicted petitioner on both counts. Under 8 U.S.C. 1451(e), petitioner's conviction for violating Section 1425(a) resulted in mandatory revocation of her naturalization. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-39a. As the court explained, petitioner's conviction under Section 1425(a) required proof that she "had obtained her naturalization 'contrary to law,' meaning the government had to prove that her conduct violated at least one other law applicable to naturalization." *Id.* at 9a. In this case, the government offered evidence that petitioner had violated two such laws: (1) 18 U.S.C. 1015(a), which prohibits knowingly making a false statement under oath relating to naturalization; and (2) 8 U.S.C. 1427(a)(3), which prohibits the naturalization of a candidate who lacks "good moral character," defined to include a person "who has given false testimony for the purpose of obtaining" an immigration benefit, 8 U.S.C. 1101(f)(6). See Pet. App. 9a.

The court of appeals considered and rejected petitioner's argument that proof of a material false statement was required to sustain a conviction under Section 1425(a). Pet. App. 7a, 15a. The court observed that "the term 'material' is found nowhere in § 1425(a)," and thus "[a] plain reading of the statute" indicates that materiality is not an element of the offense. *Id.* at 8a. The court rejected petitioner's invitation to "[r]ead[] an implied element of materiality into" Section 1425(a). *Id.* at 9a. Doing so, the court explained, would be "inconsistent with other laws criminalizing false statements in immigration proceedings and regulating the naturalization process." *Ibid.*

The court of appeals also observed that neither of the predicate offenses on which petitioner's Section 1425(a) conviction was based—Section 1015(a) and 8 U.S.C. 1427(a)(3)—requires proof of materiality. Requiring materiality under Section 1425(a) thus

"would lead to incongruous legal outcomes." Pet. App. 10a, 19a; see *id.* at 18a-19a, 25a.

The court of appeals explained that the lack of a materiality requirement under Section 1425(a) was consistent with Congress's establishment of "a two-track system for denaturalization." Pet. App. 10a. Under one track, denaturalization can occur in a civil proceeding in which the government is subject to a lower burden of proof but is explicitly required to demonstrate "concealment of a material fact." *Ibid.* (quoting 8 U.S.C. 1451(a)). Under the second track, invoked in this case, denaturalization is "a mandatory ministerial act" under 8 U.S.C. 1451(e) that follows a criminal conviction pursuant to Section 1425(a). Pet. App. 10a; see *id.* at 12a-13a. Although conviction under Section 1425(a) itself does not require the government to prove materiality, the government must meet the exacting procedural and constitutional requirements of a criminal prosecution, including proving the elements of the offense beyond a reasonable doubt. *Id.* at 12a-13a.

Finally, the court of appeals recognized that other circuit courts had suggested or held that Section 1425(a) includes an implied element of materiality, but it found those decisions "unpersuasive." Pet. App. 22a. In particular, the court stated that the Ninth Circuit's decision in *United States* v. *Puerta*, 982 F.2d 1297 (1992), "suffers from a number of problems," including that it interprets the phrase "contrary to law" in a manner that "ignores the fact that other violations of federal law pertaining to false statements in immigration proceedings do not require proof of materiality," Pet. App. 24a. Other circuits have followed *Puerta* "without engaging in their own analysis

of the statutory language," *id.* at 23a, or have assumed that materiality was required based on the parties' agreement, *id.* at 22a.

Judge Gibbons concurred in order to express her "uncertain[ty]" as to "what goal Congress intended to further by omitting materiality from the elements of § 1425(a)." Pet. App. 39a. She nonetheless joined the unanimous decision because "the view most faithful to the statute is that materiality is not an element of the § 1425(a) offense." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-24) that materiality is an element of a conviction under 18 U.S.C. 1425(a) for knowingly procuring naturalization contrary to law. Petitioner is incorrect. Section 1425(a) does not require proof of materiality, and reading that requirement into the statute would contravene principles of statutory interpretation, would conflict with the scheme of criminal and civil immigration laws, and would lead to incongruous results. Although some disagreement exists among the courts of appeals, the disagreement is far shallower than petitioner suggests and does not warrant this Court's intervention.

1. Section 1425(a) prohibits "knowingly procur[ing] or attempt[ing] to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship." 18 U.S.C. 1425(a). As the court of appeals noted, "the term 'material' is found nowhere in § 1425(a)." Pet. App. 8a. Thus, under "[a] plain reading of the statute," materiality is not an element of the offense. *Ibid.*; see *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (declining to infer materiality requirement where statute, 18 U.S.C. 1014, prohibited making a false statement

for the purpose of influencing the actions of a bank but did not "so much as mention materiality"); see also *United States* v. *Shabani*, 513 U.S. 10, 17 (1994) (declining to infer an overt-act requirement into drug conspiracy statute, 21 U.S.C. 846, where "the plain language of the statute," by failing to mention such a requirement, "reveal[s] that proof of an overt act is not required").

a. Petitioner argues (Pet. 16) that reliance on the plain text of Section 1425(a) "is an overly simplistic approach to statutory interpretation." She also contends (Pet. 16-17) that "§ 1425(a) requires materiality through the word 'procure'" because "an immaterial false statement that 'did not influence' the naturalization decision could not possibly have 'procured' that decision." But she cites no authority establishing in this context that "procure" inherently requires a material false statement or, indeed, a false statement of any kind. See Pet. App. 24a; see also pp. 12-13, *infra*. Unlike the word "fraud," the word "procure" is not a common law term that as a matter of presumed congressional intent carries a materiality requirement. Cf. *Neder* v. *United States*, 527 U.S. 1, 22-23 (1999) (applying that rule to mail fraud, in violation of 18 U.S.C. 1341).

Petitioner's effort to read into Section 1425(a) a materiality requirement is similar to an argument that this Court rejected in *Wells*, *supra*. There, the Court considered whether 18 U.S.C. 1014, which prohibits "knowingly making any false statement or report for the purpose of influencing" certain banking decisions, requires proof that the false statement was material. 519 U.S. at 490 (brackets, citation, and ellipsis omitted). The Court determined that proof of materiality

was not required. The Court relied first and foremost on the statute's text, observing that "[n]owhere does [the statute] further say that a material fact must be the subject of the false statement or so much as mention materiality." *Ibid.* (footnote omitted). "To the contrary," the Court explained, "its terms cover 'any' false statement that meets the other requirements of the statute, and the term 'false statement' carries no general suggestion of influential significance." *Ibid.*

Especially notable for present purposes, the *Wells* Court was unpersuaded by the defendants' argument that it should "read[] materiality into the statute to avoid the improbability that Congress intended to impose substantial criminal penalties on relatively trivial or innocent conduct." 519 U.S. at 498. Focusing on the requirement that the false statement must be made "'for the purpose of influencing' a bank," the Court explained that such a statement "will not usually be about something a banker would regard as trivial." *Id.* at 499. Therefore, the Court concluded, a "literal reading of the statute"—that is, a reading that did *not* infer an unstated materiality requirement—"will not normally take the scope of § 1014 beyond the limit that a materiality requirement would impose." *Ibid.* The same logic applies to a conviction under Section 1425(a).

b. Petitioner further contends (Pet. 22) that her conviction "cannot stand because § 1015(a)—a predicate offense for the § 1425(a) violation in this case—also requires a material false statement." Petitioner is mistaken.

As an initial matter, petitioner's argument ignores that the jury was instructed on *two* predicate offenses: Section 1015 and 8 U.S.C. 1427(a)(3). See Pet. App.

85a-86a. The latter statute prohibits naturalization of a person who is not "a person of good moral character," which is defined to exclude "one who has given false testimony for the purpose of obtaining" naturalization, 8 U.S.C. 1101(f)(6). At no point in this litigation has petitioner alleged that proof of materiality is required either under 8 U.S.C. 1427(a)(3) or under its definitional statute, 8 U.S.C. 1101(f)(6), neither of which mentions materiality. See Pet. App. 25a n.9 (observing that petitioner "has not challenged this aspect of the jury instructions"). As far as the predicate offenses are concerned, therefore, the verdict is supported by sufficient evidence on a valid legal theory, regardless of the materiality of petitioner's falsehoods. And for the reasons discussed below, even if an error in the Section 1015(a) jury instructions existed in failing to mention materiality, it would be harmless. See pp. 17-18, *infra*; see also *Skilling* v. *United States*, 561 U.S. 358, 414 (2010) (error on one alternative theory of guilt may be harmless).

In any event, proof of materiality is also not required under Section 1015(a). That provision punishes a person who "knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization." As the Ninth Circuit has observed, "Congress's omission of 'material' from § 1015(a), combined with its inclusion of 'material' in a similar statutory provision ([18 U.S.C.] § 1001(a)), is evidence of Congress's expressed intent not to impose a materiality requirement in § 1015(a)." *United States* v. *Youssef*, 547 F.3d 1090, 1094 (2008); see *id.* at 1093 ("As in *Wells*, § 1015(a) does not include an express materiality requirement."). Thus,

"[e]very other circuit to consider the question has reached the same result and held that materiality is not an element of § 1015(a)." Pet. App. 18a-19a; see *Youssef*, 547 F.3d at 1095 ("[W]e do not interpret § 1015 to include a materiality requirement."); *United States* v. *Abuagla*, 336 F.3d 277, 279 (4th Cir. 2003) (similar). Because neither of the predicate offenses relied upon in this case requires proof of materiality, it would be anomalous to read an implied materiality requirement into Section 1425(a).

Petitioner's argument is also inconsistent with the statutory scheme more generally. As the court of appeals recognized, Section "1425(a) is but one statute within a broader statutory framework governing denaturalization." Pet. App. 9a. The phrase "contrary to law" in Section 1425(a) "is broad enough to include not only violations of the INA's [Immigration and Naturalization Act's] administrative requirements for naturalization but also any criminal offense against the United States pertaining to naturalization." *Id.* at 16a-17a. Courts of appeals have thus affirmed convictions under Section 1425(a) that were based on predicate violations of a number of different statutes. See, *e.g.*, *United States* v. *Munyenyezi*, 781 F.3d 532, 536 (1st Cir.) (predicate violation of 18 U.S.C. 1001), cert. denied, 136 S. Ct. 214 (2015); *United States* v. *Damrah*, 412 F.3d 618, 622-623 (6th Cir. 2005) (18 U.S.C. 1001 and 1015(a)); *United States* v. *Alameh*, 341 F.3d 167, 171-172 (2d Cir. 2003) (18 U.S.C. 1546(a)).

Under such a regime—in which the defendant's conduct may be alleged as being "contrary to law" under several different provisions—an implied requirement of materiality makes little sense. For ex-

ample, a defendant might knowingly procure or attempt to procure naturalization by bribing an immigration official. Although such conduct would plainly satisfy the "contrary to law" element of Section 1425(a), see 18 U.S.C. 201(b)(1), it would involve no false statement or omission to which a materiality requirement might be applied. Furthermore, as the court below pointed out, under petitioner's reading of the statutory scheme, "a person could violate 18 U.S.C. § 1015(a) by making 'any immaterial false statement' on an application for naturalization but [would] not be guilty of procuring his naturalization 'contrary to law' in violation of 18 U.S.C. § 1425(a), unless the government could also show that the false statement was material." Pet. App. 19a (brackets omitted). Nothing supports the supposition that Congress intended such an incongruous result.

c. Finally, petitioner argues (Pet. 17-18) that a materiality requirement should be read into Section 1425 because materiality is an element under the civil denaturalization statute, 8 U.S.C. 1451(a). Petitioner is again mistaken.

As the court of appeals explained, "[t]he INA creates what are essentially two alternative paths for denaturalization," one civil and one criminal. Pet. App. 10a. First, under 8 U.S.C. 1451(a), a citizen's naturalization may be set aside in a civil proceeding if such "naturalization w[as] illegally procured or w[as] procured by concealment of a material fact or by willful misrepresentation." Second, under 8 U.S.C. 1451(e), denaturalization occurs as an automatic consequence of a criminal conviction under Section 1425. The difference between those two paths confirms why

reading a materiality requirement into Section 1425 would be inappropriate.

By its plain language, the civil denaturalization provision requires proof that naturalization was procured "by concealment of a *material* fact." 8 U.S.C. 1451(a) (emphasis added); see *Kungys* v. *United States*, 485 U.S. 759, 772-773 (1988). The criminal provision, in contrast, contains no similar requirement; and, indeed, petitioner "does not argue that 8 U.S.C. § 1451(e) contains an implied element of materiality." Pet. App. 13a. Congress's inclusion of a materiality requirement in the civil denaturalization provision, while simultaneously omitting a similar requirement from the criminal provision, reinforces the conclusion that Congress *also* did not require proof of materiality under the statute that triggers criminal denaturalization—namely, Section 1425(a). See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely.") (internal quotation marks omitted).

The different elements for civil and criminal denaturalization also reflect the different procedural safeguards that apply to those paths. In a civil proceeding under 8 U.S.C. 1451(a), once the government initially offers clear and convincing proof that the naturalized citizen improperly procured naturalization, the burden shifts to the defendant to rebut a "presumption of ineligibility." Pet. App. 11a. Given the burden-shifting and relatively low standard of proof in such a civil proceeding, it makes sense that Congress would impose a

heightened materiality requirement. Under the criminal path, by contrast, denaturalization will not occur unless the defendant has been convicted of a criminal offense under Section 1425. "[A]s in any criminal prosecution, the government has the burden to establish the elements of the offense beyond a reasonable doubt, and the accused has the right to all of the constitutional due process he would otherwise not receive as part of a civil denaturalization proceeding under [8 U.S.C.] § 1451(a), including the right not to testify or put on proof at all." *Id.* at 13a.

Petitioner responds (Pet. 18) that "greater procedural protections are generally required for criminal as opposed to civil proceedings * * * because criminal proceedings generally have a more direct adverse impact on a person's life, liberty, or property." Although that is true as a general matter, the consequence of a civil proceeding under 8 U.S.C. 1451(a) is the same as one of the consequences of a criminal proceeding under 8 U.S.C. 1451(e): the loss of citizenship. Therefore, "for Congress to impose greater *substantive* requirements in civil denaturalization proceedings, where lesser *procedural* protections are required," is not "counter-intuitive" as petitioner claims (Pet. 18), but instead is "consistent with a two-track statutory scheme for denaturalization," Pet. App. 29a.

2. Petitioner asserts (Pet. 1, 15-16) that the decision in this case conflicts with prior decisions of the First, Fourth, Seventh, and Ninth Circuits. While some disagreement between the courts of appeals does exist, petitioner greatly overstates the conflict. And in any event, this case would be a poor vehicle to address whether a conviction under Section 1425(a)

requires proof of materiality because petitioner's lies plainly were material.

a. The earliest case in support of petitioner's position was *United States* v. *Puerta*, 982 F.2d 1297 (1992), in which the Ninth Circuit held that the government was required to prove that the defendant's statements were material in order to support a conviction under Section 1425(a). The court's analysis was brief and was based primarily on three considerations: (1) proof of materiality is required in a civil denaturalization proceeding under 8 U.S.C. 1451(a); (2) "the government agree[d] with Puerta that § 1425(a) implies a materiality requirement"; and (3) the court believed that "the gravity of the consequences" of mandatory denaturalization called for a showing of materiality under Section 1425(a). 982 F.2d at 1301 (citation omitted). In *United States* v. *Alferahin*, 433 F.3d 1148, 1155 (2006), the Ninth Circuit reaffirmed its holding in *Puerta*, despite the government's argument "that *Puerta* was decided incorrectly and that § 1425(a) contains no materiality requirement." Petitioner is correct that the holding of *Puerta* is inconsistent with the holding in this case.

But the conflict is not widespread. Although petitioner asserts (Pet. 15) that three other courts of appeals have joined the Ninth Circuit in requiring proof of materiality for a conviction under Section 1425(a), none of the decisions she cites creates a square conflict with the decision below. In the First Circuit's decision in *Munyenyezi*, *supra*, the materiality element was not contested on appeal because the defendant conceded that her "statements were know-

ingly made and material." 781 F.3d at 538 n.6.* In *United States* v. *Latchin*, 554 F.3d 709 (7th Cir. 2009), cert. denied, 558 U.S. 1116 (2010), the parties "agree[d] that a false statement has to be 'material' to sustain a conviction" under Section 1425(a) based on a predicate violation of Section 1001(a). *Id.* at 712. But since Section 1001(a) itself requires proof of a "material" falsehood or omission, the parties had no need to contest—and the court of appeals had no occasion to decide—whether proof of materiality is required where, as here, the "contrary to law" element is satisfied through the violation of a predicate statute that does *not* require materiality. Petitioner's reliance on *United States* v. *Aladekoba*, 61 Fed. Appx. 27 (4th Cir. 2003) (per curiam), is similarly misplaced. Not only can an unpublished decision not create a circuit conflict, but the Section 1425(a) conviction in that case was also premised on the defendant's false statements in violation of Section 1001(a). See *id.* at 28.

In sum, only the Ninth Circuit has held, contrary to the decision below, that materiality is an element of a Section 1425(a) conviction in a case where the issue was contested and the predicate statute did not already require proof of materiality. This Court's plenary review, before the courts of appeals have had an opportunity to choose between *Puerta* and the well-reasoned decision below, would therefore be premature.

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* Petitioner does not rely upon the First Circuit's decision in *United States* v. *Mensah*, 737 F.3d 789 (2013), cert. denied, 134 S. Ct. 1912 (2014), and for good reason. In that case, the defendant was convicted even though the district court had imposed a materiality requirement, *id.* at 807-808, and so the issue was taken as a given on appeal.

b. Finally, this case is a poor vehicle to address whether proof of materiality is required for a conviction under Section 1425(a) because petitioner's misstatements to immigration officials plainly were material. In 1998, petitioner falsely stated under oath to immigration officials that her family feared persecution because her husband had not served in the Bosnian Serb army during the civil war. In fact, petitioner's husband had been an officer in a unit of the Bosnian Serb Army that participated in the Srebrenica massacre, a genocide of Bosnian Muslims. Petitioner also swore to immigration officials that she and her husband had lived apart between 1992 to 1997, when in fact they had lived together during that time. Pet. App. 4a. Only a week after her husband's arrest for making false statements on a government document, petitioner lied twice on her naturalization application, claiming in response to two different questions that she had not given false or misleading information to government officials while applying for immigration benefits. *Id.* at 5a.

Petitioner's lies were material, because they had "a natural tendency to influence, or [were] capable of influencing, the decision of" immigration officials. *Neder*, 527 U.S. at 16 (citation omitted). Indeed, the jury heard testimony that, "had [petitioner] answered those two [naturalization application] questions truthfully, there would have been further investigation into her application for refugee and permanent residence status, and her application would have been significantly delayed and possibly denied." Gov't C.A. Br. 21, 27-28 (citations omitted). Therefore, as the government argued below, see *id.* at 27-29, any error in failing to instruct the jury on materiality was harm-

less. See *Neder*, 527 U.S. at 7-15 (omission of an element is subject to harmless-error analysis).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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